Filed 7/27/10 P. v. Palmer CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM RAY PALMER, JR., Defendant and Appellant.	C060921 (Super. Ct. No. 08F3574)

A jury convicted defendant William Palmer of two counts of the infliction of corporal injury on a cohabitant by a repeat offender (Pen. Code, §§ 273.5, subd. (a)/273.5, subd. (e)), and one count of making criminal threats (Pen. Code, § 422). The trial court sustained recidivist allegations and sentenced him to an aggregate term of 17 years in state prison.

On appeal, defendant argues there is insufficient evidence of a traumatic condition resulting from the corporal injury, the trial court prejudicially abused its discretion in admitting

evidence of uncharged acts of domestic violence, his trial was "fundamentally unfair" because the court excluded evidence of a felony conviction of a prosecution witness while admitting equally remote felony convictions of defendant and his sole witness, and the court erred in declining his invitation to exercise its discretion under Penal Code section 1385 (undesignated section references are to this code) to strike a recidivist finding. This court's miscellaneous order number 2010-002, filed March 16, 2010, deems defendant to have also raised the issue (without additional briefing) of whether amendments to section 4019 apply retroactively to his pending appeal and entitle him to extra presentence conduct credits. We shall affirm as modified.

FACTS

The victim is defendant's wife. The charges are based on defendant's conduct in March and April 2008.

A. March 2008

The victim testified at trial that she and defendant had argued over his intent to use her vehicle (which was their only means of transportation) when she needed it. She ran to the vehicle and tried to climb into the driver's door in an effort to get the keys from defendant, who was already seated inside. He pushed her out and tried to close the door, which slammed on her hand. She thought this was an accident. She fell on her own to the ground; he drove away. She noticed that her neighbor was outside. The police arrived in response to the call of a second neighbor.

The victim had told the police at the time of incident that the argument began when she asked defendant to fill out divorce papers, leading to the fight over use of the vehicle. She also told them there was an incident of domestic abuse about two to three weeks earlier in which defendant had punched her in the stomach. At trial, the victim asserted that her statements to the police might have been a result of her lingering anger at defendant and consequently may have been colored unfavorably toward him. She insisted defendant had never punched her in the stomach.

The first neighbor testified that she had witnessed the incident, going to her front door when she heard the argument. She was approaching the vehicle when she saw defendant pull his wife out of it. The neighbor pointedly told defendant that it was his wife's vehicle, but he ignored her. The neighbor saw defendant slam the door when the victim reached in to grab the keys. She also saw defendant push his wife to the ground and curse at her before driving off.

B. April 2008

The victim testified at trial that she and defendant had an argument one evening, after which she left and stayed overnight with a friend. When she came home the next day, they argued about the fact that she had spent a night away from home. She believed that she may have told defendant that she wanted a divorce, because that was the subject of her arguments with him when angry. A friend of defendant, who was staying with them, was in the living room. She and defendant went into the bedroom

while they continued to argue. As defendant was sitting on the bed, she attacked him. He put up a foot to block her, making contact with her thigh. He tried to leave the room, accidentally stepping on her foot. They wound up in the kitchen, where *she* dared him to slit her throat. *He* did not make any threat to slit her throat. They struggled over her purse; she was able to grab it from him and went to the second neighbor's home, where she phoned her mother and said she needed a ride. She did not ask her mother to call the police. The police, however, arrived in response to a call from the mother, and the victim spoke with them.

The second neighbor had told police at the time that the victim had said to her that defendant had kicked her very hard in the leg. The second neighbor, however, testified at trial that she had not spoken to any investigators and denied even having a phone. Although she claimed that she could not remember this particular incident occurring, she admitted the victim might have complained once about defendant kicking her in the leg.

The victim told the police at the time that defendant had hit her arm the night before, bruising it. In describing their present argument, she said defendant had kicked her thigh as she passed where he was sitting on the bed, which caused her to fall to the ground in pain. As she lay there, he came over to her and stomped on her foot. When they went into the kitchen, *he* threatened to slit her throat. She said she was very afraid of defendant, and would not even go outside to smoke because she

saw him near the patrol car. She had not wanted to call them because she recently had discovered that she was pregnant and wanted to sort things out. At trial, the victim did not recall telling any of this to the police.

The victim's mother testified that she had received a call from the victim, who was crying and telling her that defendant had kicked her in the leg. The victim also told her mother that defendant had threatened to slit her throat. The mother decided to call the police. The victim admitted at trial that she possibly told her mother defendant had kicked her, but she had never told her mother that he had made a threat to slit her throat.

The sole defense witness was the friend staying with the victim and defendant at the time of the incident. He testified that from where he was sitting in the living room, he could see defendant sitting on the bed in the other room. He did not see defendant kick the victim or stomp on her. He did not hear any threat about slitting a throat. However, on the day of the incident, the friend had told police that he could *not* see what was happening in the bedroom during the fight.

C. Other incidents

In addition to the victim's incidental references to other uncharged acts of domestic violence on defendant's part (i.e., the stomach punch and the bruised arm), her mother testified that the victim had told her about an occasion shortly after their marriage in which he knocked her to the ground while she was holding her young daughter and was pregnant with another

child. (The probation report indicated the victim had married defendant in 2006.) The victim had also told her about defendant hitting her hard enough to crack her tooth, and to leave her crawling on the floor because she could not see to stand up; the victim's mother was not clear whether these were separate incidents. The victim denied at trial that either of these incidents occurred.

The mother of defendant's two older sons testified that after the birth of their first child, defendant began to push her around and threaten to kill her. There were "several" occasions on which he put his hands around her neck and squeezed it, or tried to smother her nose and mouth. She also testified about two specific instances.

In February 2001, on the day before she gave birth to their younger son, defendant shoved her to the ground of the garage with both hands. Defendant then drove so recklessly with her and their one-year-old son in the truck, nearly flipping it, that she urinated in her pants.

In August 2001, she and defendant had recently ended their relationship. She went to his parents' home with the children at his request, where they had an argument about her recent filing to obtain sole custody (in the course of which he also asserted his desire to have sex with her). When she started to leave, defendant tried to wrest away the carrier with the children in it. She was able to put the children in the car, but defendant slit the tires. He threatened to kill her and began throwing objects at the car, including a sledge hammer

that broke through the rear window. He grabbed one child out of the car; she grabbed the other and followed him into the house. He chased her around the house, assaulting her and trying to confine her in a bathroom. The argument finally ended a couple of hours later when defendant announced that he was leaving. She asked for the phone; he threw it on the floor. She called the police. The prosecutor introduced photographs documenting the property damage and the injuries to the children's mother. She asserted that she was still afraid of defendant, although she maintained contact with his parents and would occasionally see him there.

DISCUSSION

I

Unlike other statutes requiring the infliction of serious or great bodily injury, the "traumatic condition" that must be the result of a defendant's infliction of corporal injury on a spouse can be only minor, as long as there is an abnormal change in the victim's body (such as a wound, or some other external or internal injury). (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1085-1086 [bruise sufficient, pain alone is not]; *People v. Abrego* (1993) 21 Cal.App.4th 133, 137-138 [pain or tenderness not sufficient]; *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [instruction properly defines traumatic condition to include minor injuries].)

In the March incident, the hand of the victim was bruised for several days after defendant shut the car door on it, she had an abrasion on her elbow, and she had a scratch on her

breast from the struggle with defendant. The responding officer and the victim's mother observed these injuries. In the April incident, the police and the mother observed a small, painful raised welt on the victim's leg where defendant had kicked it, a swelling on her foot where he had stomped on it, and a scratch on her knee. Given that even a bruise qualifies under the statute, we do not find persuasive defendant's largely ipse dixit assertion that these physical manifestations of the force he applied to the person of the victim are insufficient evidence. It is not necessary, as his description of the facts seems to suggest, that the injury either caused an impairment of function or required medical attention. We reject the argument.

II

Before trial, the prosecution moved in limine to admit the incidents of uncharged domestic violence that we have detailed above. Defense counsel moved to exclude only the facts underlying defendant's 2000 felony conviction for making criminal threats or his 2001 misdemeanor conviction for domestic violence resulting from the August 2001 attack on the mother of his sons, or the fact that the victim miscarried her fetus after the shoving incident to which her mother testified (which was the result of the umbilical cord being wrapped around the fetus).

At the hearing, the prosecution indicated that it did not intend to make use of the facts underlying the conviction for criminal threats, subject to the manner in which evidence developed at trial. With respect to the mother of defendant's

other children, the prosecutor indicated there were more incidents than the August 2001 attack (in particular, the shoving and driving incident in February 2001, and defendant's other assaults on her). Defense counsel did not contest admissibility, but asserted undue prejudice from some of the details, including the fact that the mother experienced premature labor after the February 2001 incident. The court agreed to exclude evidence of premature labor. The court did not consider defendant's behavior to be particularly egregious during the August 2001 incident, and admitted all the details to which defense counsel had objected (save the fact that they resulted in a misdemeanor conviction, to which the parties later stipulated).

Turning to uncharged acts of domestic abuse involving the victim, the prosecutor agreed not to make any reference to the miscarriage after the shoving incident. Otherwise, defense counsel conceded that he could not frame an objection to the rest of the evidence. He believed they were minor.

Defendant now argues this evidence exceeded the offer of proof from the prosecution (though he cites only the stomach-punching incident involving the victim). He challenges the lack of a time or place for the other two incidents involving the victim (and asserts, somewhat unclearly, that the mother did not establish personal knowledge of these). However, trial counsel conceded the admissibility of the prior incidents involving the victim. Defendant has thus forfeited our plenary consideration of these arguments. He fails to establish for purposes of

direct appeal that trial counsel *could* not have had any reasonable basis not to challenge the admission of this evidence (*People v. Pope* (1979) 23 Cal.3d 412, 426), or that he was prejudiced in any respect (*People v. Ledesma* (1987) 43 Cal.3d 171, 217). We therefore switch our focus to the incidents in 2001.

Defendant complains that the testimony involving the August 2001 incident was unnecessarily detailed,[1] and the 2001 incidents were too remote. He also incorrectly claims the prosecutor "urged the jury to hold appellant accountable for his pattern of abuse over the years"; the portions to which he cites simply argue properly that the evidence showed defendant had a propensity for domestic violence.

The gist, however, of his argument is that the admission of the evidence was an abuse of the court's discretion because the prejudicial value significantly outweighed its probative value, invoking our analogous decision in *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*) involving uncharged sexual offenses.[2]

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[1] He contends the stipulation to the resulting misdemeanor conviction negated the need for the underlying details. However, the stipulation did not have anything to do with the underlying facts; the misdemeanor conviction was otherwise inadmissible for proof of recidivist spousal abuse absent the stipulation. (*People v. Wheeler* (1992) 4 Cal.4th 284, 297-300.)

[2] He also contends the admission of this evidence violated his federal right to due process, acknowledging that this issue has been conclusively resolved against him under California law. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310 [applying analogous holding of *People v. Falsetta* (1999) 21 Cal.4th 903 involving uncharged sexual offenses (*Falsetta*)].) He has thus preserved the issue for possible federal review, and we do not

In deciding whether to admit uncharged offenses, a court should consider factors such as the inflammatory nature of the facts, the degree to which the jury may become distracted from its main inquiry and instead seek to punish a defendant for extrajudicial conduct, the remoteness of the conduct, the degree to which proof would consume an undue amount of time, and the materiality of the evidence to disputed issues. (*Harris*, *supra*, 60 Cal.App.4th at pp. 737-41; accord, *Falsetta*, *supra*, 21 Cal.4th at pp. 916-917 [also suggesting court should consider certainty that other offenses took place and burden of defending against the uncharged offenses].) As with any evidentiary determination, we review the trial court's ruling for abuse of discretion. (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.)

The conduct underlying the present offenses is cruel and callous: deliberately slamming a door on the victim's hand, kicking the newly pregnant victim hard enough that she dropped to the floor in pain, walking over and stomping on her foot while she was down, and threatening to slit her throat. Without belaboring the point, it was not an abuse of discretion to rule that his uncharged offenses (whether against his wife or the mother of his other children) do not exceed this benchmark of cruelty and callousness, are not identical (except for showing his lack of respect for the condition of pregnancy), and do not otherwise contain any particularly inflammatory details. The fact that defendant's course of conduct against the mother of

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need to address it further.

his other children resulted in a criminal conviction dispels concerns that the jury would be tempted to punish him in the present proceedings for this conduct or be distracted with the need to determine whether it in fact occurred. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917.) It also was not an abuse of discretion to conclude that other offenses are not excessively remote, nor would require an undue amount of time to present through the percipient witness (and the victim's mother) or to defend against. Finally, this evidence was material to the issue of whether the victim's exculpatory testimony or her contemporaneous description of defendant's conduct was a more truthful account. In short, we do not find the trial court abused its discretion in admitting any of this evidence.

III

Before trial, defense counsel had sought permission to impeach the first neighbor with a 1995 conviction for felony welfare fraud, based on a complaint filed in 1991 relating to conduct ending in 1990. The trial court found the offense to be de minimus, in that it ordinarily would have been the subject of a misdemeanor prosecution rather than a felony, and was too remote. It therefore ruled the conviction was not admissible.

Defendant contends the exclusion of this evidence[3] as remote

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[3] Defendant also purports to challenge the exclusion of evidence of a "petty theft as an infraction in 2000." However, defense counsel expressly abjured any interest in using anything other than the conviction for welfare fraud for impeachment, and therefore did not ask the trial court to rule on the question. The issue consequently is forfeited on appeal. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1179.)

was arbitrary and capricious in light of the trial court's other rulings admitting the prior convictions of defendant and his witness for impeachment, and resulted in a fundamentally unfair trial that violated his right to due process. We disagree.

The exclusion of the neighbor's 1995 felony conviction for welfare fraud (which in turn was based on conduct predating the 1991 complaint in the matter) as de minimus and too remote was not outside the bounds of reason. (E.g., *People v. Pitts* (1990 223 Cal.App.3d 1547, 1554 [upholding trial court's rule of thumb presumption excluding convictions older than 10 years absent unusual circumstances].) The court's contrary ruling regarding prior convictions of defendant and the defense witness does not demonstrate a latent arbitrariness. As we detail more fully in the next part of the Discussion, defendant's felony conviction in 1996 is the first of four in the course of an almost nonstop 13-year period of new offenses and violations of probation or parole. (Since defendant chose not to testify, the jury ultimately learned only of the 2001 misdemeanor conviction for spousal abuse, in order to prove the charge of spousal abuse by a repeat offender). The defense witness also had a string of six felony convictions, starting with a 1992 unlawful possession of an assault weapon and ending with a 2001 conviction for being an accessory to an unspecified felony that involved controlled substances. As neither defendant nor the defense witness had led legally blameless lives after incurring these convictions in the mid-1990s (e.g., *People v. Campbell* (1994) 23 Cal.App.4th 1488, 1496-1497 [allowing impeachment with otherwise remote

prior conviction]), the trial court could rationally distinguish between the neighbor's situation and theirs without being arbitrary.

As defendant failed to establish any error in the court's evidentiary rulings, we do not need to consider the question of prejudice from the exclusion or admission of the impeachment evidence. As for his claim of a violation of his right to due process, the court's particularized exercise of discretion in each instance in a reasonable manner does not trample his constitutional rights. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [reasonable exercise of trial court's discretion under ordinary rules of evidence does not impermissibly infringe on right to present a defense, nor is any error of federal constitutional magnitude absent deprivation of material evidence for *arbitrary* reasons].) We therefore reject this argument.

IV

Defense counsel invited the trial court to exercise its discretion to strike the finding (§ 1385) that defendant had a 2000 felony conviction for making a criminal threat, which made him subject to a doubled prison sentence (§ 667, subds. (d)(1) & (e)(1)). The written submission asked the court to consider seven factors: the prior conviction was remote and involved the same conduct as the recidivist finding of a prior prison term (§ 667.5); the present offenses were less serious because there were only slight injuries; the victim did not want a long prison sentence as punishment; the punishment otherwise (a term of more

than 17 years) was disproportionate to the offense, and would constitute cruel and unusual punishment; and the sentence would mean that the newborn child of the victim and defendant would grow up without a father.

At the hearing, the trial court noted the injuries from the present offenses were minor, but there was more than one offense of domestic abuse. Moreover, there were the uncharged acts of domestic abuse with the mother of defendant's other children, as well as his misdemeanor conviction for abusing her. Defendant's prior record since 1995 included four felonies (theft (1996), escape (1996), the criminal threats (2000), and possession of a firearm by a convicted felon (2001)), along with a 1995 juvenile adjudication for assault; the court noted that "[t]here's rarely a year that's not mentioned as a year in which he suffered some type of conviction or a violation of parole . . . ." As for the character, background, and prospects of defendant, the court acknowledged he had the gainful occupation of welder (that his frequent imprisonment had interrupted), but he had not shown any signs since becoming an adult of "turn[ing] himself around." It therefore declined to strike the finding.

A court may exercise its discretion under section 1385 to strike an allegation or finding that a prior conviction comes within the meaning of section 667, subdivision (d) if, *and only if*, a defendant can be "deemed outside the . . . spirit" of the statute, without any consideration of "extrinsic" factors such as court congestion *or antipathy to the sentencing consequences for the defendant*, and giving "preponderant weight" to factors

inherent in the statute such as the nature and circumstances of the present and previous felony convictions, and the defendant's own background, character, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The burden is on defendant to demonstrate that the trial court's decision was irrational or arbitrary, rather than being one of alternative reasonable readings of the facts before the court, which requires him to overcome the "strong" presumption that a court's denial of a request to exercise discretion under section 1385 is proper. (*People v. Carmony* (2004) 33 Cal.4th 367, 377, 378.)

Beyond reiterating the factors presented to the trial court, defendant adds on appeal only the assertion that the trial court disregarded the purported guiding principle under section 1385 of assuring that "unjust" sentencing does not result, citing *People v. Burke* (1956) 47 Cal.2d 45, 50. The case is inapposite, as it does not involve the more narrow boundaries within which a court may exercise discretion under section 1385 to strike a finding pursuant to section 667, which specifically *exclude* antipathy to the resulting length of the sentence.

Defendant has not demonstrated a law-abiding character such that it would be an abuse of discretion to find that he is exactly the sort of recidivist at whom the Legislature and the electorate have aimed with these sentencing provisions. For 14 years, defendant has failed to comply with the law despite his numerous chances at probation and parole. It is immaterial that his transgressions have not been violent. Society, through the

trial court, is not compelled to define deviancy downward and excuse the flouting of more minor mandates such as compliance with the conditions of probation and parole, or felony conduct involving "only" threats or "minor" injuries. His iterated refusal to conform his behavior to social strictures merits a greater punishment for the present offense. As a result, we cannot say the trial court was *unreasonable* in coming to this conclusion. (Compare *People v. Cluff* (2001) 87 Cal.App.4th 991, 994, 1004 [suggesting failure to strike recidivist finding would be abuse of discretion where present offense is only a technical failure to update offender registration with duplicative data].) We therefore reject his argument.

V

The Supreme Court has granted review to resolve a split in authority over whether the January 2010 amendments to section 4019 are retroactive. (*People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010 (S181963) [giving retroactive effect to amendments]; accord *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010 (S182808); *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010 (S182183); *contra*, *People v. Rodriguez* (2010) 182 Cal.App.4th 535, review granted April 13, 2010 (S181808).) Other published cases (none of which is final) are equally divided on the issue. (*People v. Keating* (2010) 185 Cal.App.4th 364, pet. for review filed July 12, 2010 (S184354); *People v. Pelayo* (2010) 184 Cal.App.4th 481, pet. for review filed June 15, 2010 (S183552); *People v. Norton* (2010) 184 Cal.App.4th 408,

pet. for review filed June 7, 2010 (S183260); *contra*, *People v. Eusebio* (2010) 185 Cal.App.4th 900; *People v. Hopkins* (2010) 184 Cal.App.4th 615, pet. for review filed June 21, 2010 (S183724); *People v. Otubuah* (2010) 184 Cal.App.4th 422, time for granting review on court's own motion extended to Sept. 8, 2010 (S184314).)

Pending a determinative resolution of the issue, we adhere to the conclusion that the amendments apply to all appeals pending at the time of their enactment. (Cf. *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendments that lessened punishment for crime apply to acts committed before passage, provided judgment is not final]; *People v. Doganiere* (1978) 86 Cal.App.3d 237; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [both of which apply *Estrada* to amendments involving custody credits].)

Defendant is not subject to registration as a sex offender and does not have present or prior convictions for violent or "serious" felonies (§ 667.5, subd. (b); § 1192.7, subd. (c)). He is therefore entitled to accrue presentence work and conduct credits at a rate of two days for every four days of actual custody served (§ 4019, subds. (b)(1) & (c)(1)), with the result that a period of four days is deemed served for every two-day period of actual presentence custody (*id.*, subd. (f)). With 264 days of actual custody, he is now entitled to 264 days of

presentence conduct credits rather than 132. We will direct the trial court to amend the abstract of decision accordingly.[4]

DISPOSITION

The judgment is affirmed with an award of an additional 132 days of presentence conduct credits. The trial court is directed to issue an amended abstract of decision reflecting a total award of 264 days of presentence conduct credits, and forward a copy of the abstract to the Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

We concur:

RAYE, J.

HULL, J.

[4] We have noted in the abstract that there is a typographical error. In Count one, section 275.5e should be 273.5e. The trial court is directed to amend the abstract to reflect this correction.